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IN THE

Supreme Court of the United States

RICHARD TOMIC,

Petitioner,

v.

CATHOLIC DIOCESE OF PEORIA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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Respondent asserts that there is no disagreement in the lower courts about the scope of the "ministerial exception" to federal anti-discrimination laws, and argues that adjudication of petitioner's claims under the Age Discrimination in Employment Act (ADEA) would run afoul of respondent's First Amendment rights. Neither point is correct.

A. Lay Employees Of Religious Organizations With Comparable Responsibilities Are Covered By The Ministerial Exception In Some Circuits, But Not Others

Respondent argues that no conflict among the circuits warrants this Court's review because the lower courts have consistently concluded that they lack authority to review decisions concerning the hiring and firing of *members of the clergy*. The courts of appeals do agree on that much—but on nothing more.[1] Most significantly for this case, the courts of appeals differ significantly in their approaches to discrimination suits brought by *lay* employees of religious organizations.[2] And although the court below concluded that peti-

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[1] Moreover, as noted in the petition for certiorari, a panel of the Third Circuit recently ruled that a sex discrimination lawsuit brought by a chaplain of a religiously-affiliated university could go forward. That case is being reheard by another panel. *See* Pet. 9 n.9; *Petruska* v. *Gannon Univ.*, 448 F.3d 615, *vacated for panel reh'g*, No. 05-1222, 2006 U.S. App. LEXIS 15088 (3d Cir. June 20, 2006).

[2] It is also unclear what *aspects* of the employment relationship are covered by the ministerial exception. Several circuits have stated broadly that ministers may not challenge the terms of their employment. *See* Pet. App. 6a (decision below; stating that a religious organization must "not be constrained in its dealings with [clergy] by employment laws that would interfere with the church's internal management"); *McClure* v. *Salvation Army*, 460 F.2d 553, 559-560 (5th Cir. 1972) (explaining that "[m]atters touching th[e] relationship" between a minister and his church, including salary, place of assignment, and other duties, "must necessarily be recognized as of prime ecclesiastical concern," and therefore protected by the First Amendment from government interference). Yet recent Ninth Circuit cases allow even ordained ministers—those at the core of the ministerial exception, however defined—to bring sexual harassment claims, including claims for constructive discharge, even though such litigation certainly implicates the terms of a church's relationship with its ministers.

tioner was a "minister" for purposes of the ministerial exception, respondent does not suggest that petitioner is actually a member of the clergy of the Catholic Church; petitioner is a lay organist and music director.

Courts vary markedly in their analysis of which, if any, lay employees are covered by the ministerial exception. The Second, Third, and Eighth Circuits have begun their analysis of lay employees' employment discrimination claims by addressing whether adjudication of the claim poses "'a significant risk that the First Amendment will be infringed.'" *Weissman* v. *Congregation Shaare Emeth*, 38 F.3d 1038, 1042 (8th Cir. 1994) (quoting *NLRB* v. *Catholic Bishop of Chi.*, 440 U.S. 490, 502 (1979)); *see also Geary* v. *Visitation of the Blessed Virgin Mary Parish Sch.*, 7 F.3d 324, 327 (3d Cir. 1993); *DeMarco* v. *Holy Cross High Sch.*, 4 F.3d 166, 169 (2d Cir. 1993). Concluding that the ADEA does not itself require "extensive or continuous administrative or judicial intrusion into the function of religious institutions," *Weissman*, 38 F.3d at 1043; *see also Geary*, 7 F.3d at 328; *DeMarco*, 4 F.3d at 170, those courts then examined the nature of the relationship between the particular plaintiff and the religious organization to determine whether any threat to religious freedom would result from adjudication of the discrimination claim.

All three circuits determined that no such threat would necessarily result from adjudication of ADEA claims brought by lay employees, and in so ruling, all three circuits concluded that cases involving members of the clergy should not be applied to cases involving lay employees. *See Weissman*, 38 F.3d at 1044; *Geary*, 7 F.3d at 331; *DeMarco*, 4 F.3d

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See Elvig v. *Calvin Presbyterian Church*, 375 F.3d 951 (9th Cir. 2004); *Bollard* v. *California Province of Soc'y of Jesus*, 196 F.3d 940 (9th Cir. 1999). Respondent asserts that this line of cases "raises no conflict whatsoever with the other Circuits' application of the ministerial exception." Br. in Opp. 20. To the contrary, these cases show that the Ninth Circuit—unlike the Seventh Circuit and other courts aligned with it—rejects the notion that any inquiry into the employment relationship between ministers and religious organizations is constitutionally forbidden.

at 171. They recognized that some lay employees may have such "pervasively religious" relationships with their employers that it would be impossible to litigate a discrimination suit without running afoul of the First Amendment. *DeMarco*, 4 F.3d at 171-172; *Weissman*, 38 F.3d at 1044 (quoting *DeMarco*). Nonetheless, the Eighth Circuit explicitly declined to expand the ministerial exception to encompass employees who are not members of the clergy. *Weissman*, 38 F.3d at 1044 n.6. The Second and Third Circuits both declined to find that teachers at Catholic schools had such a "pervasively religious" employment relationship that adjudication of their discrimination suits would be constitutionally forbidden, even though the teachers in those cases had significant religious duties. *DeMarco*, 4 F.3d at 172 (finding a teacher who was expected to lead students in prayer did not fall within the ministerial exception); *Geary*, 7 F.3d at 331 (finding a teacher required to serve as a "visible witness to the Catholic Church's philosophy and principles" did not fall within the ministerial exception).

Other courts, by contrast, have taken a much more expansive view of the ministerial exception. Rather than starting with the fundamental question of whether the suit could be litigated without posing a significant risk of interfering with a religious organization's First Amendment rights, these courts have begun (and, generally, ended) with the question whether a lay employee should be categorized as a minister. *See Alicea-Hernandez* v. *Catholic Bishop of Chi.*, 320 F.3d 698, 703 (7th Cir. 2003) ("It is therefore not our role to determine whether the Church had a secular or religious reason for the alleged mistreatment of Alicea-Hernandez. The only question is that of the appropriate characterization of her position."); *EEOC* v. *Roman Catholic Diocese*, 213 F.3d 795, 801-802 (4th Cir. 2000); *EEOC* v. *Catholic Univ. of Am.*, 83 F.3d 455, 463-465 (D.C. Cir. 1996); *Starkman* v. *Evans*, 198 F.3d 173, 175-176 (5th Cir. 1999). If a lay employee falls within their broad definition of "minister," the case is barred, even if the dispute could be decided without any reference to religious doctrine. *Starkman*, 198 F.3d at 175 ("If Ms. Starkman is considered a 'minister' and

falls under the exception, this Court may not inquire into her employment and must dismiss her suit against the Church."); *Catholic Univ.*, 83 F.3d at 464-465; *Alicea-Hernandez*, 320 F.3d at 703; *Roman Catholic Diocese*, 213 F.3d at 801 ("The exception precludes any inquiry whatsoever into the reasons behind a church's ministerial employment decision.").

Moreover, these same courts take a much broader view of which lay employees fall within the ministerial exception. The D.C. and Fifth Circuits include within the exception those "whose *primary functions* serve [the religious organization's] spiritual and pastoral mission." *Catholic Univ.*, 83 F.3d at 463 (emphasis added); *Starkman*, 198 F.3d 173 at 176 (quoting *Catholic Univ.*). The Seventh Circuit barred petitioner's suit because his duties "had a significant religious dimension." Pet. App. 8a. The Fourth Circuit has indicated that the exception applies unless the employee performs "no spiritual function" and has suggested that it would permit only "purely custodial or administrative personnel" to bring suit against a religious employer. *Roman Catholic Diocese*, 213 F.3d at 801.

These approaches would clearly lead to different results in different circuits. The Seventh Circuit, for example, has held that a press secretary was a "minister," and therefore barred from bringing a sex-discrimination suit, because she often served as the "primary communications link" between the church and the general public—even though there was no suggestion that she had a role in any religious ceremony, had any specialized religious training, or served in a leadership role in formulating the church's message. *See Alicea-Hernandez*, 320 F.3d at 703-704. The Second, Third, and Eighth Circuits, by contrast, are likely to have allowed her suit to proceed. In those circuits, the mere fact that a lay employee's "primary functions serve [the religious organization's] spiritual and pastoral mission" or have "a significant religious dimension" is clearly insufficient to require the suit to be dismissed at the pleadings stage.

By contrast with the Seventh Circuit, the Eighth Circuit allowed a temple administrator's ADEA suit to proceed, even though he was required to have a Jewish background, served as the initial contact for prospective members, and acted to promote the image of the temple to members and the broader community. *Weissman*, 38 F.3d at 1040.[3] Like the press secretary in *Alicea-Hernandez*, he often served as the "primary communications link" to the public, *see Alicea-Hernandez*, 320 F.3d at 704, and his "primary functions served [the religious organization's] spiritual and pastoral mission," *Catholic Univ.*, 83 F.3d at 463. The D.C., Fourth, Fifth, and Seventh Circuits, therefore, likely would have barred his suit.[4]

As noted above, the Second and Third Circuits have allowed ADEA suits brought by parochial school teachers with religious duties to proceed past the pleading stage. Respondent dismisses cases involving teachers at parochial schools as not comparable to the current case. Br. in Opp. 14, 16, 21. Yet respondent states that lay employees are properly considered ministers "where their primary duties consist of teaching, spreading the faith, . . . or supervision or participation in religious ritual and worship." *Id.* at 7. As this Court has recognized, teachers in religiously-affiliated

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[3] Respondent asserts (Br. in Opp. 17) that the temple administrator in *Weissman* was nothing more than a "high-level janitor." That reading of *Weissman* is demonstrably incorrect. While the administrator (like the press secretary in *Alicea-Hernandez*) was not involved in making liturgical or doctrinal decisions, he was directly involved in promoting the message of the temple to the membership and the general public.

[4] The Fourth Circuit's decisions are not consistent. *Compare Dole* v. *Shenandoah Baptist Church*, 899 F.2d 1389, 1396 (4th Cir. 1990) (excluding from the ministerial exception teachers who "taught from a pervasively religious perspective, . . . [led] students in prayer and are required to subscribe to the Shenandoah statement of faith as a condition of employment") *with Clapper* v. *Chesapeake Conference of Seventh-Day Adventists*, 166 F.3d 1208, 1998 WL 904528, at *3, *7 (4th Cir. 1998) (including within the exception a teacher who led students in prayer, conducted worship with his students, and incorporated theology into the traditional curriculum).

primary and secondary schools are typically involved in all three of these activities. *See Catholic Bishop of Chi.*, 440 U.S. at 501 (noting "the critical and unique role of the teacher in fulfilling the mission of a church-operated school"); *Lemon* v. *Kurtzman*, 403 U.S. 602, 617 (1971). Courts—and the Catholic Church—have pointed to the "religious significance" of parochial school teachers. *See Little* v. *Wuerl*, 929 F.2d 944, 948 (3d Cir. 1991); *id.* at 948 n.5 (quoting a publication of the National Conference of Catholic Bishops as explaining that "[t]he integration of religious truth and values with the rest of life is brought about in the Catholic school not only by its unique curriculum but, more important, by the presence of teachers who express an integrated approach to learning and living in their private and professional lives"). Indeed, respondent acknowledges that, "by definition, at least some of their duties will involve propagation of a church's religious message." Br. in Opp. 16. Employment decisions concerning teachers at religiously-affiliated schools would therefore seem to "relate to how and by whom churches spread their message." *Id.* at 11; *see Rayburn* v. *General Conference of Seventh-Day Adventists*, 772 F.2d 1164, 1168 (4th Cir. 1985) ("[P]erpetuation of a church's existence may depend upon those whom it selects to preach its values, teach its message, and interpret its doctrines both to its own membership and to the world at large.").

It is difficult to see why parochial school teachers who teach from a religiously-oriented perspective, supervise and participate in worship, and serve as the face and voice of the church on a daily basis *are not* ministers, while a press secretary who has no duties involving religious worship *is* a minister merely because she is involved in promoting her church's message to the public. *Compare Dole* v. *Shenandoah Baptist Church*, 899 F.2d 1389, 1396 (4th Cir. 1990) (excluding from the ministerial exception teachers who "taught from a pervasively religious perspective, . . . [led] students in prayer and are required to subscribe to the Shenandoah statement of faith as a condition of employment") *with Alicea-Hernandez*, 320 F.3d at 704. Given the widely diver-

gent results in the lower courts, this Court's review is needed to provide guidance to the lower courts about the proper scope and application of any constitutionally-based exemption to federal anti-discrimination laws in the context of religious organizations.

B. Litigation Of Petitioner's Claims Would Not Implicate First Amendment Concerns

Although respondent states that all music directors are *per se* members of the clergy,[5] Br. in Opp. 13, 21, it provides no reason to conclude that petitioner's suit would implicate First Amendment concerns. To be sure, petitioner participated in religious ceremonies. *But see DeMarco*, 4 F.3d at 172 (allowing suit to proceed where plaintiff was fired for failing to attend Mass and lead students in prayer). But respondent has never stated that disputes over the manner in which petitioner performed those duties formed the basis for his dismissal. Indeed, Respondent nowhere suggests that petitioner was fired for any religious reason whatsoever. And while respondent (without citation to anything in the record) now characterizes as "highly suspect" the suggestion that "no religious considerations" were involved in hiring petitioner, Br. in Opp. 12, nothing in the job description of petitioner's position in the record requires that the employee in that position be an adherent of the Catholic faith or have completed any course of study involving Catholic doctrine or practices. In any event, at the motion to dismiss stage, all of petitioner's assertions are to be taken as true and all ambiguities are to be resolved in his favor. *See Hishon* v. *King & Spalding*, 467 U.S. 69,73 (1984).

Given this understanding of the music director position that petitioner filled, there is little risk of harm to respondent's First Amendment interests in allowing this suit to proceed. Petitioner does not challenge the ability of reli-

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[5] This contradicts respondent's position elsewhere in its brief that the rights of potential plaintiffs are protected because such decisions must be made on a case-by-case basis. Br. in Opp. 16, 18.

gious organizations to control the hiring and firing of ordained clergy or those who fill positions requiring the same sort of specialized religious training as clergy. This latitude protects respondent's right to make ecclesiastical decisions about the governance of the church. Similarly, since the diocese has made no suggestion petitioner was fired for religious reasons, the court is unlikely to be faced in this case with any disputes about doctrine, avoiding unconstitutional entanglement that would violate the Establishment Clause. Should such an issue arise later in the proceeding, respondent could then move to limit the scope of judicial inquiry in the case. The Seventh Circuit's assertion that the case will "likely" lead the court into a "theological controversy" (Pet. App. 6a) is pure speculation at this stage of the proceeding.

Allowing complaints to proceed where they do not directly implicate First Amendment concerns not only protects these First Amendment rights of religious employers, but also gives force to anti-discrimination statutes whenever possible. Congress's careful exemption for discrimination by religious organizations *based on religion* strongly suggests that Congress intended other anti-discrimination provisions to apply to religious entities.[6] *See DeMarco*, 4 F.3d at 172-173 (concluding that Congress intended the ADEA to apply to religious institutions); *see also Geary*, 7 F.3d at 331; *Weissman*, 38 F.3d at 1045; *Ritter* v. *Mount St. Mary's Coll.*, 814 F.2d 986, 988 n.1 (4th Cir. 1987). Given the broad reach of the ADEA, the application of the ministerial exception amounts, in effect, to a determination that the pertinent law would be unconstitutional as applied to the particular case. The exception, therefore, should be "limited to what is necessary to comply with the First Amendment." *Bollard* v.

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[6] *Compare* 42 U.S.C. § 2000e-1(a) ("This subchapter shall not apply . . . to a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.") *with* 29 U.S.C. § 621.

California Province of Soc'y of Jesus, 196 F.3d 940, 947 (9th Cir. 1999); *see also United States* v. *Booker*, 543 U.S. 220, 258 (2005) ("[W]e must 'refrain from invalidating more of [a] statute than is necessary.'" (citation omitted)).

C. A Direct Circuit Conflict Exists On Whether The Religious Freedom Restoration Act Supplants The Ministerial Exception

Respondent does not dispute that the decision below and *Hankins* v. *Lyght*, 441 F.3d 96 (2d Cir. 2006) are in direct conflict with respect to the effect of the Religious Freedom Restoration Act (RFRA) on the continued viability of the ministerial exception. Nor does the recent district court decision in *Redhead* v. *Conference of Seventh-Day Adventists*, 2006 WL 2075196 (E.D.N.Y. July 27, 2006), alleviate the conflict. *Redhead* concerns a religious organization's employment decision made on religious grounds. Under those circumstances, as the *Redhead* court notes, it is likely that something akin to the ministerial exception would be constitutionally required to ensure that federal courts were not called upon to decide religious questions. *Id.* at *7. It is far less clear that in a case such as this one, which does not involve religious discrimination, that anti-discrimination laws would place a substantial burden on the religious employer and require analysis under RFRA.

Even if anti-discrimination laws such as the ADEA do cause a substantial burden on religious activity, the Second Circuit made no suggestion that the ministerial exception was the appropriate remedy. Indeed, given the district court's clear disapproval of the Second Circuit's order to apply RFRA and its conclusion that RFRA and the ministerial exception easily co-exist, *see Redhead*, 2006 WL 2075196, at *5 ("The court has strong reservations in proceeding on the assumption that the RFRA is applicable in a suit between private parties . . . ."); *id.* at *7, it is far from clear that the district court's reliance on the ministerial exception follows that mandate and will be upheld by the court on appeal. *See Hankins*, 441 F.3d at 102 ("Whatever the merits of [the ministerial exception] as statutory interpretation or policy, it

has no basis in statutory text, whereas the RFRA, if applicable, is explicit legislation that could not be more on point. Given the absence of other relevant statutory language, the RFRA must be deemed the full expression of Congress's intent with regard to the religion-related issues before us and displace earlier judge-made doctrines that might have been used to ameliorate the ADEA's impact on religious organizations and activities."). Given the uncertainty created by the disagreement between the Second and Seventh Circuits on this issue, lower courts would benefit from clear guidance on the correct approach.

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For the foregoing reasons, and for those set forth in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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